No. 94185-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:

TODD DALE PHELPS,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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I.
SUPPLEMENTAL ARGUMENT

Phelps hereby incorporates the facts and arguments set forth in his Personal Restraint Petition and his other briefing filed in the Court of Appeals, Division II.

A. GROOMING EVIDENCE IS INADMISSIBLE "PROFILE" EVIDENCE WHEN PRESENTED IN THE STATE'S CASE-IN-CHIEF

On its website, this Court states that the issue in this case as:

> Whether in this prosecution for second degree sexual misconduct with a minor, the State was required to present expert testimony to support its claim that the defendant engaged in "grooming" activity, and if so, whether the prosecutor committed prejudicial misconduct by arguing that the defendant engaged in such conduct without expert evidentiary support.

Counsel is aware that these general statements are drafted by the Commissioner's Office and do not necessarily reflect the precise issue before this Court.

But this issue statement suggests that evidence of grooming is not "per se" inadmissible in the State's case-in-chief. But in Washington, "grooming" testimony is not admissible except in certain limited situations. Testimony about "grooming" is profile testimony. In *State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785, 789-90 (1992), *amended* (Jan. 4, 1993), the court said: "[P]rofile testimony that does nothing more

than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice." *Id.* at 936. "Perpetrator profile testimony clearly carries with it the implied opinion that the defendant is the sort of person who would engage in the alleged act, and therefore did it in this case too." *Id.* at 939 n. 6. This has been the law since 1983. See, e.g., *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173 (1984) (witness improperly testified that in "eighty-five to ninety percent of our cases, the child is molested by someone they already know"), *overruled in part by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1998); *State v. Claflin*, 38 Wn. App. 847, 852, 690 P.2d 1186 (1984) (testimony that 43 percent of child molestation cases "were reported" to have been committed by "father figures" inadmissible under ER 403), *review denied*, 103 Wn.2d 1014 (1985); *State v. Maule*, 35 Wn. App. 287, 293, 667 P.2d 96 (1983) (expert improperly testified that "the majority" of child sexual abuse cases involve "a male parent-figure"); *State v. Steward*, 34 Wn. App. 221, 224, 660 P.2d 278 (1983) (expert improperly testified in murder prosecution of a babysitting boyfriend that "serious injuries to children were often inflicted by either live-in or babysitting boyfriends").

The State has not asked this Court to overrule these decisions.

There is no distinction between the use of the concept of grooming in *Braham* and the prosecutor's actions in this case. Here, the prosecutor relied on the concept of grooming throughout the trial. He argued that the process of "grooming" included "trying to get someone to trust you," "being nice," engaging in physical contact, meeting with a child's parents to deflect their concerns, texting, talking about other sexual relationships, and isolating the child. According to the prosecutor, because Phelps did all those things, i.e., fit the profile of a child rapist, he was therefore guilty.

To the extent the State argues that the trial prosecutor's actions here cannot be misconduct because this Court has never found similar actions of a prosecutor misconduct, the argument must be rejected. Mr. Halstead is an experienced prosecutor. As such, he was surely aware of the decision in *Braham*, a Washington case that was published in 1992. Certainly, every prosecutor knows that "profile" or "character" testimony is inadmissible to prove that the defendant is guilty of the crime. Even if Mr. Halstad had presented an expert in his case-in-chief, the concept of grooming – at least as argued in this case – was clearly inadmissible under existing state court precedent.

The State argues that Washington law did not require that grooming be established by expert testimony in 2012. The argument

appears to be that because there was no Washington case directly on point, there can be no prosecutorial misconduct.

This is far too narrow a focus and the State does not cite to any authority to support the proposition that, unless this Court has expressly prohibited a particular argument there can be no prosecutorial misconduct. The prosecutor is the representative, not of an ordinary party to a controversy, but of a sovereignty whose:

> obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The prosecutor's higher duty requires that if he has any question about arguing this evidence without an expert's support, he should refrain from doing so.

B. IF THE CONCEPT OF "GROOMING" IS ADMISSIBLE, IT MUST BE PRESENTED BY AN EXPERT

There may have been no Washington case that expressly said that grooming could only be presented by an expert. But a prosecutor could

certainly have concluded that, if grooming evidence was admissible, it had to be presented by an expert after reading *Braham.*

The Court of Appeals opinion cites to *Morris v. State*, 361 S.W.3d 649, 659-62 (Tex. Crim. App. 2011) and notes:

> The *Morris* court then considered whether testimony about "the grooming phenomenon [was] just common knowledge" or whether it would be useful to the jury to hear expert testimony on the subject. 361 S.W.3d at 668. The court held that "we find the weightier and more persuasive authority to be that expert grooming testimony is useful to the jury." *Morris*, 361 S.W.3d at 669. It commented:
>
> Although it may be true that many jurors will be aware of the concept of grooming (in practice if not necessarily by name), that does not mean that all jurors will be aware of the concept or that the jurors will have the depth of understanding needed to resolve the issues before them.
>
> *Morris*, 361 S.W.3d at 669 (emphasis added). *Morris* suggests that to fully understand grooming testimony, expert testimony is generally required.

In re Phelps, 197 Wn. App. 653, 678, 389 P.3d 758, 770 (2017).

Morris cites to *Braham*. Thus, had the prosecutor simply "shepardized" *Braham*, he would have recognized that many courts had held that the use of grooming testimony was fraught with difficulties and should only be presented with expert support.

Moreover, the cases demonstrate that even the experts disagree on the precise factors that go into the concept of grooming. If the experts themselves disagree, it can hardly be said that grooming is within the

"common understanding" of the jury. For example, in the published cases, Lucy Berliner, a well-known expert in the field of child sexual abuse, describes the dynamics of the child-offender relationship before the initiation of sexual abuse. These dynamics include three components: 1) "sexualization," where the offender starts off under the guise of "normal behavior" and non-sexual physical contact but becomes increasingly more sexual and intrusive, 2) "justification," where the offender tells the child that the touching isn't really sexual, perhaps that it is hygienic or educational, and 3) "cooperation," where the offender persuades the child not to tell by threatening some type of harm or bad consequence. *Braham*, 67 Wn. App. at 934 n.4 (Ms. Berliner testified in this criminal case, describing the findings of her study "The Process of Victimization," which appeared in the Journal of Child Abuse & Neglect).

Another expert, who testified about "grooming" in a criminal trial, added that in the process the offender often somehow leads the victim into feeling responsible. Some offenders might ask the child, "Do you mind if I do this?" And the child, who really has no power in the relationship to begin with, doesn't object. And so then, when the sexual molestation follows, the child feels that he or she must have been some kind of partner in the molestation. *State v. Stafford*, 157 Or. App. 445, 449, 972 P.2d 47, 49 (1998) (quoting Dr. Michael Knapp, a licensed clinical psychologist

with specialized training in the treatment of offenders), *review denied*, 329 Or. 358, 994 P.2d 125 (1999).

Here, the prosecutor introduced the concept in voir dire and asked jurors what they thought grooming entailed. But what jurors might commonly think of as "grooming" is irrelevant because grooming is a concept that must be presented by an expert. The trial judge said that very thing in responding to a defense objection during trial. There was no expert testimony regarding grooming in this case. Thus, if some the jurors' definitions of grooming were erroneous, there was no testimony to correct the opinions expressed in voir dire.

Worse yet, the prosecutor presented his own definition of "grooming" and argued that grooming under his definition occurred in this case. He did this to explain why there was no physical evidence, why the victim made conflicting statements, and why Phelps and his witnesses were not credible. The prosecutor told the jury certain actions taken by Phelps were grooming. But those connections were of the prosecutor's own invention. For example, the prosecutor argued that certain actions taken by Phelps were intended to "groom" other adults in A.A.'s life. But there is no support in the expert testimony provided in other published cases that the concept of grooming applies to anyone other than the victim.

C. TO THE EXTENT THAT "GROOMING" IS WITHIN THE COMMON UNDERSTANDING OF THE JURORS, THAT "COMMON UNDERSTANDING" LIKELY WAS INCORRECT

When the prosecutor introduced the concept of grooming during voir dire, it was clear that jurors understood the concept to include with it the implied assumption that a person who engages in grooming is the sort of person who would commit child rape. Thus, even without expert testimony to explain grooming behaviors, the prosecutor erred. It is impermissible for the prosecutor to make arguments that invoke the jurors' prejudices or misconceptions about "profiles" in a quest for a guilty finding. In essence, the prosecutor was arguing that the conflicting evidence could be ignored because the jury knew that a person who befriended a troubled girl, texted her repeatedly, and kissed her was the kind of person who committed rape.

Thus, in this case, the common understanding of the jury *necessitated* expert testimony. Assuming for the moment that there is some basis for the admissibility of "grooming," there is a fine line between expert testimony explaining what constitutes grooming and profiling. Thus, experts are necessary to tell the jury what specialists agree are elements of this modus operandi and to combat popular misconceptions or possible stereotypes or the use of the concept to "profile" the defendant.

II. CONCLUSION

This Court should affirm the Court of Appeals opinion.

DATED this 3rd day of October, 2017.

Respectfully submitted,

Suzanne Lee Elliott

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email or First Class United States Mail, postage prepaid, where indicated, one copy of this brief on the following:

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